DISTRICT OF COLUMBIA
Office of Administrative Hearings
One Judiciary Square
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Washington, DC 20001-2714

CHARLIE DAVIS Petitioner, v. DISTRICT OF COLUMBIA DEPARTMENT ON DISABILITY SERVICES, REHABILITATION SERVICES ADMINISTRATION Respondent BILLIE RUTH SCHLANK Additional Rule 19 Respondent	Case No.: 2011-DDS-00001

ORDER

I. Introduction

This Order grants the motion for summary adjudication filed by Petitioner Charlie Davis and reverses the decision of Respondent, Rehabilitation Services Administration of the District of Columbia Department on Disability Services ("RSA") denying Mr. Davis the opportunity to operate Facility #31 under the Randolph Sheppard Vending Facility Program ("RSVFP").

II. Statutory and Regulatory Background

The RSVFP is a federal program authorized by the Randolph-Sheppard Act. 20 U.S.C. §§ 107 *et seq.* It is administered by state agencies and provides blind persons the opportunity to operate vending facilities such as cafeterias, snack bars, and automatic vending machines on federal property. 20 U.S.C. §§ 107(a)-(b). Under RSVFP, state agencies recruit, train, license,

and place blind individuals as operators of vending facilities. 20 U.S.C. § 107a(b)-(c). RSA administers the program in the District of Columbia, which is considered a state in the program. 20 U.S.C. § 107e(5)

A Promotion and Transfer Committee compiles semi-annual rankings of all vendors in the District's RSVFP, based upon each vendor's performance and seniority. 29 DCMR 207, 208. When a vending facility becomes available, vendors may bid for the right to operate that facility. The bidder with the highest ranking from the Committee has the right to transfer to the newly-available facility. If that vendor declines, the facility is offered to the next highest ranking bidder until the vacancy is filled. 29 DCMR 207.4.

III. Procedural History[1]

A. The Challenge to the Suspension

On January 6, 2011, Mr. Davis, through his attorney, Joseph R. Cooney, Esq., filed a petition for hearing to challenge RSA's proposed 90-day suspension of Mr. Davis from the RSVFP. The suspension was set to begin on January 7, 2011. Mr. Davis had been scheduled to transfer to a new facility (Facility #31, located in the United States Department of Labor building) but the suspension made it impossible for him to do so. Judge Handy issued an order temporarily staying the suspension and scheduling a status conference for January 10.

I presided over the January 10 status conference, as Judge Handy was not available. Mr. Davis appeared at the conference represented by Mr. Cooney; Turna Lewis, Esq., represented RSA. At the status conference, RSA stated that it had rescinded the suspension and had

[1] The following discussion omits procedural details that are unnecessary for the disposition of the summary adjudication motion.

approved Mr. Davis' transfer to Facility #31, provided that Mr. Davis provided RSA with proof of his current Professional Food Manager certification. I therefore vacated the temporary stay, pending Mr. Davis' submission of his current certification to RSA. As Mr. Davis had attached a copy of his current certification to his motion papers, it appeared that this issue would be resolved easily.

B. The Subsequent Denial of the Transfer

Pending the transfer, Petitioner alleged that an issue still to be resolved was his claim that he should have been transferred as of September 15, 2010, and that he should receive the income that he would have earned had the transfer occurred as scheduled. I set an evidentiary hearing for February 3, 2011, to address that claim, as well as any claims that would arise if the transfer did not occur.

On February 3, both Mr. Davis and RSA appeared at the evidentiary hearing, represented by counsel. Contrary to RSA's statement at the January 10 status conference, RSA announced that it decided not to transfer Petitioner to Facility #31. Instead, RSA expected to award that facility to a different vendor, based upon a revision of the September 2010 vendor rankings. Counsel for Mr. Davis objected to that decision.

Because RSA's decision significantly changed the scope of the case, I set a new hearing date for March 14 and 15 to decide whether the decision to transfer Facility #31 to another vendor was lawful and, if not, the appropriate remedy for Petitioner. Further, I issued an order amending the hearing request to include Petitioner's challenge to the decision awarding the facility to another vendor.

C. Motion for Summary Judgment

On February 28, 2011, before the scheduled hearing, Mr. Davis filed a motion for summary judgment. In light of that motion, I altered the schedule of the case and converted the March 14 hearing into an argument date for summary judgment, with RSA's response to the summary judgment motion due March 10. RSA filed a timely opposition on March 10.

D. Joinder of an Additional Party

After the summary judgment hearing, and after receiving written arguments from the parties, I joined Billie Ruth Schlank, the vendor who had been designated to operate Facility #31 instead of Mr. Davis, as a party respondent. I did so in reliance upon Superior Court – Civil Rule 19(a), because Ms. Schlank claims an interest in Facility #31 and the decision in this case may impede her ability to protect that interest.

E. Interim Order

On June 17, 2011, I issued an Order informing the parties of my decision to grant Petitioner's summary judgment motion with a full opinion to follow. This Order sets forth my reasoning for granting the motion.

IV. Undisputed Facts[2]

Mr. Davis is a blind resident of the District and has participated in the RSVFP since 1972. Before the events at issue in this case, he operated Facility #7 at the Ronald Reagan Building for several years.

[2] I have relied upon exhibits filed in connection with the scheduled hearing as the source for many of the undisputed facts.

In May 2010, the operator of Facility #31 died and that facility became available for another vendor. Mr. Davis was interested in transferring to that facility and, along with other vendors, put in a bid for it. On September 3, 2010, the Promotion and Transfer Committee ranked the vendors and found that Mr. Davis had the highest number of points of all vendors who were interested in transferring to Facility #31. Respondent's Exhibit ("RX") 203. On September 15, the Committee sent a letter to vendors announcing that Mr. Davis had won the bid on Facility #31. Petitioner's Exhibit ("PX") 101.

On October 21, 2010, RSA sent a letter to Mr. Davis informing him that his transition to Facility #31 was being withheld because his Professional Food Manager certificate had expired. PX 110; RX 206. RSA told Mr. Davis that that he would not be permitted to transfer to Facility #31 unless he re-certified his Professional Food Manager certificate by November 13, 2010. RX 208-09. Upon learning of this, Mr. Davis enrolled in a recertification course with JBL Nutrition Services ("JBL") scheduled for November 9.

Mr. Davis completed the course and took the examination administered by JBL on November 9. On November 13, RSA received a letter from JBL stating that Mr. Davis had successfully completed the certification course. PX 102. Mr. Davis received his Professional Food Manager certificate, issued by the Department of Health, on December 29, 2010. PX 104; PX 105; RX 200. On the same day, RSA suspended him from the RSVFP, effective January 7, 2011. The grounds for the suspension were that he did not have a current Professional Food Manager certification and that he had closed his facility on December 14, 2010, without notifying the building management or RSA. PX 100. As noted above, the suspension was stayed by Judge Handy's order and RSA rescinded the suspension on January 6, 2011. PX 108; RX 205.

More than four months after issuing the September 3, 2010, vendor rankings, the Promotion and Transfer Committee revised those rankings. The new rankings, issued January 28, 2011, reduced Mr. Davis' performance rating by 5 points, based on his operating his facility with an expired Professional Food Manager certificate. RX 202. As a result, Ms. Schlank had a higher ranking, and RSA informed Mr. Davis that she would receive Facility #31. PX 109.

V. Conclusions of Law

A. Summary Adjudication Standard

OAH Rule 2819.1, 1 DCMR 2819.1, permits a party to move for summary adjudication of any issue by providing "sufficient evidence of undisputed facts and citation of controlling legal authority." Under Superior Court — Civil Rule 56 (applicable here by virtue of OAH Rule 2801.1, 1 DCMR 2801.1) a party is entitled to summary judgment if the evidence in the record shows that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law. *Weakley v. Burnham Corp.*, 871 A.2d 1167, 1173 (D.C. 2005). The record is reviewed in the light most favorable to the non-moving party. *Id.* A genuine issue of material fact is one where there is sufficient evidence supporting the claimed factual dispute to require a jury or judge to resolve the parties' differing versions of the truth at trial. *Dodek v. CF 16 Corp.*, 537 A.2d 1086, 1092 (D.C. 1988).

B. No Genuine Issue of Material Fact

The material undisputed facts are that the Promotion and Transfer Committee gave Mr. Davis the highest ranking of any of the bidders for Facility #31, but changed those rankings more

than four months later. The dispositive legal issue for this motion is whether the Committee had the authority to revise its rankings. For the reasons stated below, I conclude that it did not.

C. The Committee's September 3 Decision Was Final.

The Promotion and Transfer Committee's revision of the rankings violated 29 DCMR 208.7, which unambiguously states: "The decisions of the Committee in regard to ratings shall be considered final." There are no exceptions to that rule anywhere in the regulations. As a result, the final rankings for the purpose of deciding the winning bid for Facility #31 were those voted on by the Committee on September 3, 2010, showing that Mr. Davis had the highest number of points of any bidder for that facility.

RSA argues that the rankings were mistaken because the Committee did not take into account Mr. Davis' failure to have a current Professional Food Manager certificate from the Department of Health. That failure, says RSA, should have resulted in a lower performance score for Mr. Davis, a score that was accurately reflected in the revised rankings issued on January 26. RSA contends that the Committee has the authority to correct mistaken rankings whenever it discovers such mistakes. The short answer is that the regulation doesn't say that. Section 208.7 says that the rankings "shall be considered final," not that they "shall be considered final unless the Committee later believes that it made a mistake." RSA has not provided an interpretation of the unmodified word "final" that includes the power to change the rankings at any time the Committee believes it has made a mistake.

There may be a legitimate debate about whether it is good policy to allow the Promotion and Transfer Committee to revise its rankings and, if so, the grounds for any such revisions and

the time limits within which such revisions could be made.[3] But an agency is bound by its own rules. *Macouley v. District of Columbia Taxicab Comm'n*, 623 A.2d 1207, 1209 (D.C. 1993); *Seman v. District of Columbia Rental Housing Comm'n*, 552 A.2d 863, 866 (D.C.1989); *Dankman v. District of Columbia Bd. of Elections*, 443 A.2d 507, 513 (D.C.1981) (en banc)). RSA and the Promotion and Transfer Committee must follow 29 DCMR 208.7 unless and until it is changed. Consequently, the September 3 rankings "shall be considered final."

RSA argues that any decision denying the Committee the right to change the rankings would be inconsistent with the arbitration decision in *Schlank v. District of Columbia Department of Human Services, Rehabilitation Services Administration*, Case No. R-504-6 (November 1, 2005), a decision issued under the authority of the Randolph-Sheppard Act's arbitration provision found at 20 U.S.C. § 107d-2.[4] Coincidentally, that decision involved an initial award of a different facility to Mr. Davis, followed by a change in the rankings that resulted in Ms. Schlank being declared the highest ranking bidder.[5]

For two principal reasons, the arbitration decision provides no basis for changing the result in this case. First, the issue involved in this case was not presented to, or ruled upon, by the arbitrators. Mr. Davis never challenged the change in the rankings in that case. Although the arbitration decision notes that Mr. Davis was the highest bidder and that the Promotion and Transfer Committee later decided that he was ineligible, the arbitrators never decided whether

[3] I note that anyone objecting to the ratings had the opportunity to file a hearing request. 29 DCMR 228.1; 20 U.S.C. § 107d-1(a). No one did so.

[4] The Randolph Shepard Act provides that any blind vendor dissatisfied with the result of any state-level administrative hearing may ask the United States Secretary of Education to convene an ad-hoc arbitration panel to determine the dispute. 20 U.S.C. § 107d-1(a).

[5] A summary of the decision can be found at 71 Fed. Reg. 37,928 (July 3, 2006). RSA filed a copy of the full decision on March 18, 2011.

the Committee acted properly. Instead, the arbitration involved a separate claim by Ms. Schlank that RSA (not the Committee) acted improperly by not awarding her the facility. RSA's failure to award the facility had nothing to do with the Committee's rankings. Rather, RSA claimed that it never entered into a valid contract to have the facility operated as a blind vendor's facility. The arbitrators ruled against RSA on that issue, but never decided whether the Committee was authorized to change the rankings in favor of Ms. Schlank.

Second, the arbitration decision is not a binding precedent. The report of the decision expressly states that the arbitrators' decision does "not necessarily represent the views and opinions of the U.S. Department of Education," the federal agency that administers the Randolph-Sheppard Act. *Arbitration Panel Decision Under the Randolph-Sheppard Act*, 71 Fed. Reg. 37,928 at 37,929 (July 3, 2006). The Act itself describes the panel as an "ad hoc arbitration panel," 20 U.S.C. 107d-2(a), and says only that the panel's decision shall be "final and binding on the parties," 20 U.S.C. 107d-1(a), not that it should have precedential effect. Mr. Davis was not a party to the arbitration, so the decision is not binding upon him. Moreover, the Court of Appeals has recognized that arbitration decisions do not create binding precedents. *District of Columbia Metropolitan Police Department v. District of Columbia Public Employee Relations Board*, 901 A.2d 784, 790 (DC 2006). Thus, if the arbitration decision had decided the legal issue presented in this case, it would be entitled to respectful consideration, but not precedential effect. Because it did not decide that issue, it has no bearing on this case.

Because the Promotion and Transfer Committee's decision violated 29 DCMR 207.8, the decision denying Mr. Davis' transfer to Facility #31 must be reversed.

VI. Order

For the reasons stated above, it is this **22nd** day of **March,** 2012:

ORDERED, that Mr. Davis' motion for summary adjudication is **GRANTED.** Because the Promotion and Transfer Committee's revision of its rankings violated 29 DCMR 208.7, Mr. Davis must be regarded as the winning bidder for Facility #31. RSA's decision to deny him the transfer to Facility #31 is **REVERSED;** and it is further

ORDERED, that, on or before April 6, 2012, each party shall file a statement of its position concerning whether RSA owes Mr. Davis any accrued income for any period during which he did not operate Facility #31 and, if so, the amount of any such income. Counsel for the parties shall confer in advance of the April 6 filing date in an effort to reach agreement on those issues; and it is further

ORDERED, that if the April 6 filings reveal any disagreement concerning accrued income, I will set a prompt status conference to discuss the best method for resolving any such disagreements.

/s/
John P. Dean
Principal Administrative Law Judge